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IN THE

Supreme Court of the United States

October Term, 1969

CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,

Petitioner,

v.

STATE OF OKLAHOMA, ET AL.,

Respondents.

Petition for Certiorari Filed March 3, 1969
Certiorari Granted April 21, 1969

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

The United States Government when it relocated the Cherokee Nation in the land in what is now eastern Oklahoma, granted to the Tribe fee simple title to all the land, including the river bed underlying the navigable portion of the Arkansas River. This was done by treaties and patent which vested title to the land encompassing the Arkansas River and which did not express any intention nor make any reservation with reference to retaining title to the river bed. As is set forth at page 8 of the brief of the petitioner the reason that the United States

acquired the aboriginal title from the Osage Indians, the purpose for the treaties and patent, was the removal of the Cherokee Nation from its lands in the East and the reestablishment of the Tribe in these new lands. Through these treaties and patents, the intent of Congress was to give to the Cherokee Nation full sovereignty, full autonomy to pass its own laws, not inconsistent with the Constitution of the United States.[1] See, for example, Article 5 of the Cherokee Treaty of 1835.

The United States fully intended and contemplated a completely separate and independent Nation on the acquired lands, as is demonstrated by the language contained in the the treaties that no state would be formed from such lands without its consent.[2] Accordingly the United States in its treaties agreed to vest the Cherokee Nation with fee simple title to all the land conveyed. The treaties with the Cherokee Nation specifically state the United States would possess and guarantee forever to the Indians the land in question and title to such land would be evidenced by the execution of a patent. The

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[1] See *Cherokee Nation v. Georgia,* 30 U.S. [5 Pet.] 1 and *Worcester v. Georgia,* 31 U.S. [6 Pet.] 515. These early cases point out the nature and extent of the sovereignty of the Cherokee Nation in its lands in the East. Certainly in any treaties with the United States, the Cherokee Nation would not have accepted anything less than what it orginally possessed. Nor would the United States offer less in view of its obligation to the Nation.

[2] The unique character of the Cherokee Nation's lands, has long been recognized. "Indeed it is open to serious doubt whether that large tract of land, known distinctively as the Indian Territory, is a territory of the United States within the meaning of the act . . . . A reference to some of the treaties under which it is held by the Indians indicates that it stands in an *entirely* different relation to the United States from other territories, and that for most purposes it is to be considered as an *independent* country." *Atlantic and Pacific R. Co. v. Mingus,* 165 U.S. 413, 435-438. (Emphasis added.)

Cherokee patent executed in 1838 was the first such patent. At the time of the grant to the petitioner the United States had no intention to retain title to the bed of the Arkansas River. The right of the United States to maintain a military garrison and to regulate commerce was not affected.

The brief of the respondents is voluminous, repetitious and has as its only apparent purpose confusion of the issues. The brief raises many matters which have no bearing on the issue before the Court and other matters which are not correctly stated.[3] The arguments of the respondents are not new but have been heard by this Court before and rejected.

The State of Oklahoma as a matter of State policy has attempted to declare every river within its boundaries navigable, so that it could assert title under the equal footing-implied trust doctrine upon its admission to the Union. See *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77; *Oklahoma v. Texas*, 258 U.S. 583; *United States v. Champlin Refining Co.*, 156 F.2d 769 (10th Cir. 1946). In all previous cases the principal question was whether the river in question was in fact navigable, *e.g.*, the Red River. In this case navigability is not in issue. All parties have agreed that the river was navigable at the place in issue at the time of grant. In all other cases previously considered, the Court did not have before it a question of fee simple title.

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[3] It is difficult to meet and correct the many inaccuracies for to do so would simply cause the petitioner to follow the respondents into the forest of irrelevancies which they have cultivated.

The issue, in this case, simply stated is, what title did the Cherokee Nation receive under its treaties and patent executed in the 1820's and 1830's to the bed of the river, some seventy-odd years before Oklahoma was taken into the Union. The State of Oklahoma insists that the Cherokee Nation received no title, that under the equal footing-implied trust doctrine the United States retained title and it passed to Oklahoma upon its admission to the Union.

The respondents rely for support on the following propositions:

I. EQUAL FOOTING-IMPLIED TRUST DOCTRINE

The respondents set forth at great length historical data to show that the purpose of the Louisiana Purchase Treaty was the establishment of new states in the West. The respondents also cite correspondence from President Jefferson setting forth his hope of the creation of future states. (Respondents' Brief at pp. 12-14). The respondents contend that this hope requires an application of the equal footing-implied trust doctrine.

In *Brewer-Elliott Oil & Gas Co. v. United States,* 260 U.S. 77, the State of Oklahoma, an intervenor in the suit, raised the same contention asserting that the river at the *locus in quo* was navigable and title to the land beneath the river therefore passed to the State under the equal footing-implied trust doctrine in view of the purpose of the Louisiana Purchase Treaty. This Court said:

> We do not think the declared purpose of the Louisiana Purchase Treaty with France, that statehood should be ultimately conferred on the inhabitants of the territory purchased, relied on by the appellants,

varies at all the principles to be applied in this case. *Id.* at 85.[4]

From the above quoted language, it is clear that whatever the intention of Congress in ratifying the Louisiana Purchase Treaty and whatever the hope of President Jefferson might have been, once it was the exclusive sovereign, Congress could part with the land as it deemed necessary and proper, in accordance with the guidelines first laid down in *Shively v. Bowlby*, 152 U.S. 1. The intention of Congress as expressed in the later treaties and patent granting title to the petitioner would be paramount. The intention of Congress is manifested in the treaty provisions which state that:

> The United States agree to possess the Cherokee, and to guarantee it to them forever, and that guarantee is solemnly pledged, of seven millions of acres of land, to be bounded as follows, viz:. . . See *e.g.*, Article 2 Cherokee Treaty of 1828.

The respondents in their brief assert that it was the intention of Congress to establish an Indian state which would have "a political connexion with the United States." See Respondents' Appendix 8. Accordingly Congress intended to retain title so that that state would enter on an equal footing with the original states. The House Reports which are cited in the respondents' appendix plainly indicate the hope of an Indian State governed and controlled by Indians. Such state would be more in the nature of a foreign state. Certainly Oklahoma would not have been the beneficiary of such a

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[4] It should be pointed out that in that case the crucial issue for determination was whether the river was navigable. The Court determined that the river was in fact non-navigable and it therefore applied the common law principles relating to riparian landowners. See also *Blue Jacket v. Johnson County*, 72 U.S. [5 Wall] 667.

presumption, it would have been the Indians themselves. In any event this entire argument is simply not relevant. Clearly Congress did not establish Oklahoma as a state until 1907.

To accept the respondents' position would be to admit that Congress could not convey title to the land under navigable waters as long as there was the possibility, no matter how remote, that a state might be created.[5] Obviously, this is not true. Congress may dispose of the title to property as it deems fit and proper in the national, or the public interest. See Cherokee Brief at pp. 19-20. The attempt of the respondents to distinguish *Moore v. United States,* 157 F.2d 760 (9th Cir. 1946), *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 as merely "fishing" or "specific boundary" cases simply ignores the plain language contained in these cases.

The respondents and the lower courts simply have failed to grasp the meaning and purpose of the "equal footing-implied trust doctrine." The respondents read the doctrine as an absolute rule of conveyancing. Plainly this is not so. As is pointed out in the Cherokee Brief at pp. 17-19, the equal footing doctrine applies to political equality, sovereignty. And as was stated by Mr. Justice Reed in *Alabama v. Texas,* 347 U.S. 272, 275 the "equal footing doctrine does not wipe out economic diversities" and "does not affect Congress' power to dispose of federal property." When Oklahoma entered the Union, it did so subject to whatever grants Congress may have authorized. See Oklahoma Enabling Act, 34 Stat. 267

[5] In its Amicus Brief, the Solicitor General notes that in most situations where the equal footing-implied trust doctrine was called into play statehood was imminent, (A.C. Brief at pp. 16, 23), that is, that a specific territory had been designated for inclusion in the Union and it was accomplished in a relatively short time, certainly not seventy years later.

[June 16, 1906]. See Cherokee Brief at p. 26. In this case now before the court, Congress had granted title to the land underlying the Arkansas River to the petitioner.

The respondents' examination of the early equal footing-implied trust cases serves no useful purpose other than to highlight what the petitioner has already articulated and, that is, that the United States did not obtain title to the bed of the navigable waters from the states when they entered the Union. Title to this land at the time of the Revolution was in the hands of the states and remained there, subject to the commerce clause. The United States could not grant title to such lands *after* statehood. However, the United States could grant title to such land which it *owned exclusively* (not held in trust as in *Pollard v. Hagan*, 44 U.S. (3 How.) 212) before statehood. *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471. See Cherokee Brief at p. 17.

As part of their equal footing-implied trust argument, the respondents set forth the Larrabee letter at pages 19-20 and assert that it is a supporting Executive determination. The Government in its Amicus Brief effectively nullifies this argument. (A.C. Brief at pp. 25-28). The Cherokee Nation cannot be deprived of its title by an interpretation of the equal footing-implied trust doctrine without any consideration of the specific treaties and patent. The Government having vested title in the Cherokee Nation to the land in question by valid treaties and patent, it could not be divested by a mere exchange of correspondence between two officials in the Executive branch of government.

At the time the United States entered the treaties with the Cherokee Nation it granted and guaranteed fee simple title to the land conveyed, without exception or reservation. The Government further promised that it would form no state on the lands ceded without the consent of the Cherokee Nation. This language is a clear

articulation that what occurred in Georgia would not occur in these new lands. Such treaty provisions clearly refute any inference that the United States retained title to the bed of the Arkansas River or any other navigable streams which might be circumscribed by the metes and bounds description in the grant.

II. PUBLIC PURPOSE

The respondents next contend that the United States could not have granted title to such land because there was no public purpose for such a grant to the Cherokee Nation. Drawing upon the language in *Shively v. Bowlby*, 152 U.S. 1, the respondents assert that the granting of title to the Nation was not a proper public purpose. (Respondents' Brief at pp. 25-29, 47-49). To support this contention respondents state "The Oklahoma Supreme Court efficiently disposed of that 'public purpose' contention over thirty-five years ago in the case of *Vickery v. Yahola Sand and Gravel Co.*, 12 P.2d 881." The respondents infer that the Cherokee Nation and the Federal Government could have intervened as the state did. The efficacy of a state court decision in similar matters has been the subject of this Court's comment on numerous occasions. A State Supreme Court is not the proper judicial body to pass upon the public purpose of a conveyance by the United States Congress. In *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 87 this Court stated:

> As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a Federal question. The title of the Indians grows out of a Federal grant when the Federal Government had complete sovereignty over the territory in question. See also *Oklahoma v. Texas*, 258 U.S. 574.

Indeed, the Court of Appeals in its decision left the question of public purpose unanswered. See J.A. at 141a. Certainly, it is a valid public purpose for the Government to convey title to the bed of a navigable stream to an Indian Tribe in order to accomplish the relocation of the Indian Tribe, pursuant to an Act of Congress [Indian Exchange and Removal Act, 4 Stat. 411 (1830)], to obtain the Tribe's former lands; to avoid future conflict and contact with the Tribe by white settlers; to preserve the Tribe's sovereignty, autonomy, and way of life; and to promote domestic peace and tranquility.

It is difficult for the petitioner to understand, particularly in the times in which we live, how there could be a higher public purpose than that expressed by Congress, reflecting the will of the people, in the context of its action, when considered in reference to its many previous promises given and broken. The validity of the public purpose simply cannot be denied. In *United States v. Rickert,* 188 U.S. 432, this Court, in a tax case involving an Indian, found a public purpose in safeguarding and advancing a dependent people. Accord *Creek County v. Seber,* 318 U.S. 705.

Moreover, the Court need not reach the public purpose of the grant. As was pointed out in *Shively v. Bowlby,* 152 U.S. 1, and reiterated in *Brewer-Elliott Oil & Gas Co. v. United States,* 260 U.S. 77, public purpose is a consideration only when there has been a grant to land under the navigable waters during the period of territorial government. In this case there never was a period of territorial government on the lands owned by the petitioner. It is well settled that the United States Government may dispose of property in its public domain without limitation. "Congress not only has legislative power over the public domain, [Louisiana Purchase territory was public domain] but it also exercises the

power of the proprietor therein." *Alabama v. Texas*, 347 U.S. 272. (*Per Curiam* opinion)

III. APPLICATION OF HOLT STATE BANK

The respondents at page 5 of their brief state that "The decision in *United States v. Holt State Bank*, 270 U.S. 49, (1925), *under a fact situation similar to our case*, recognizes the rule cited in *Shively v. Bowlby*. . ." This statement is not correct. *Holt State Bank* is not a similar case, the facts and legal principles are distinguishable. Even the Court of Appeals was more prudent in its description of the case, when it said "Although *Holt State Bank* was not concerned with a situation such as we have here . . ." J.A. at 139a. In *Holt State Bank*, this Court said:

> *An affirmative disposal is not asserted*, but only that the lake and therefore the lands under it were within the limits of the Red Lake Reservation when the state was admitted.
>
> *There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein*, nor any attempted exclusion of others from use of navigable waters. The effect of what was done to reserve in a general way for the continued occupation of the Indians what remained of their *aboriginal* territory. Id. at 58 (Emphasis added.)

In the petitioner's case there was an affirmative disposal of fee simple title to all the land within the metes and bounds description which circumscribed the navigable portion of the Arkansas River. The United States Government prior to the admission of Oklahoma to the Union had already granted fee simple title to the Chero-

kee Nation.[6] The Court of Appeals and the respondents have ignored the distinction between fee simple title and aboriginal Indian title. See Cherokee Brief at pp. 30-32. Clearly the affirmative grant of fee simple title, together with the express promise that no state would be formed without its consent, should in and of itself evince an intention to depart from the established policy of holding such lands for the benefit of future states.

Petitioner submits that the *Holt* Court presented with the facts of this case would find title to river bed in the hands of the petitioner.

IV. FEE SIMPLE TITLE

The respondents attempt to buttress their arguments by asserting that the petitioner did not receive fee simple title but merely a conditional grant (Respondents' Brief at page 5) and that the United States retained residual title to all the lands granted (Respondents' Brief at page 89). This assertion is founded upon the words found in its patent "shall revert to the United States if the Cherokee Nation ceases or abandons the same." It should be

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[6] The respondents on p. 33 ftn. 2 assert that the holding in *Oklahoma v. Texas*, 258 U.S. 514 is determinative. The respondents rely on the *dicta* in the case to the effect that if the Red River were navigable it would pass to the state under the doctrine of equality. The Court in that case did not have before it the specific treaties and patent granting fee simple title involved in this case, nor did the Court have before it the other circumstances demonstrating intent which are raised in this case. It should further be noted that the land in question was within the territory of Oklahoma, not Indian Territory.

emphasized that the argument of the respondents is purely an academic one because the condition upon which the reversion would take place has not occurred. By statute the tribal status of the petitioner has been preserved and so too the tribal title. See Cherokee Brief at pp. 26-27.

Until now, the fee simple nature of the grant to petitioner has been unchallenged. The United States in its treaties with the petitioner did not establish a reservation held by use and occupancy. It conveyed fee simple title. See *United States v. Creek Nation*, 295 U.S. 103.

Further, this Court has considered the nature and quality of the Cherokee title on many occasions. See, *e.g.*, *United States v. Creek Nation*, 295 U.S. 103; *Atlantic and Pacific R. Co. v. Mingus*, 165 U.S. 413. One of the earliest cases was *Holden v. Joy*, 84 U.S. [17 Wall.] 211 (1872),[7] involving a patent issued in 1867 to land formerly held by the Cherokee Nation. The land was part of the 800,000 acres conveyed by the Patent of 1838. In that case the Supreme Court examined the same treaties of 1828, 1833 and 1835 and the patent of 1838 as are presented here. The Court agreed that the Cherokee Nation had fee simple title.

The right of reversion which is set forth in the patent is no more than the articulation of the law of escheat whereby the sovereign provides for the return of title if for some reason there is an obstruction in the course of

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[7] See also *Cherokee Nation v. United States*, 9 Ind. Cl. Comm. 162 (1961).

descent.[8] Escheat attaches to all fee simple titles and in no way minimizes the quality of the title.

V. GROUNDS FOR RETAINING TITLE

The respondents contend that there were compelling reasons which would negate any intention to convey the land in question to petitioner, among them valuable mineral deposits, especially salt, and the need for a public highway to reach the lands north and west. (Respondents' Brief at pp. 75-82). The fact that the fee title to navigable waters was conveyed to the petitioner would in no way conflict with the trust to hold them for the public for navigation. See *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946). In the treaties the Government retained jurisdiction to regulate commerce on the river and it retained permission to maintain its military garrison at Gibson Cantonment. The rights of the public were fully protected by these reservations. Throughout their brief the respondents imply that if title to the river were vested in the petitioner and not in the state (under the equal footing-implied trust doctrine) the authority and power of the United States could somehow be compromised. Such an inference is absurd; no matter who

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[8] The escheat nature of these conditions was appreciated by the petitioner and by Congress. "The reversion of the lands to the United States referred to is but the reiteration of the old doctrine of escheats; a condition that attaches to all fee-simple titles to lands, and the special provision for it in the case of the Cherokees is more of an admission than otherwise that free Cherokee Nation hold its lands in fee simple." Memorial of Indian Delegates signed by representatives of the Cherokee, Choctaw Creek and Shawnee Tribes, referred to the Committee on Territories Misc. Doc. No. 41, 46th Cong. 2d Sess. Feb. 16, 1880.

holds title to the riverbed, the petitioner or the state, the rights and power of the United States are precisely the same.

The respondents seek to find comfort in the fact that that the bed of the river was thought valuable for mineral deposits, especially salt. (Respondents' Brief at pages 7, 76) If such fact were true, and, indeed even the Court of Appeals could find no value in the river bed until now (J.A. 146a), the basic need for salt would furnish strong reason for the Government conveyance to the Indians. Further, if the retention of valuable mineral rights was predominant, it would have been logical for the Government to exclude from the Nation the mineral rights under all the land conveyed. The answer is obvious the Government did not reserve and did not intend to reserve anything in these pervasive grants other than the minimum necessary to maintain the rational interest.[9]

None of the reasons asserted by the respondents militates against the conveyance of fee simple title to the petitioner.

Not only does the language of the treaties and patent executed with the petitioner, in and of itself, demonstrate a clear intent on the part of Congress to convey fee simple title, but the entire history of the Government's dealing with the petitioner, the contemporaneous circumstances, the prior condition and way of life of the petitioner all evidence the intent of Congress to establish the petitioner in a permanent home over which the Cherokee Nation would exercise full autonomy. This

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9 "The responsibility of Congress is to utilize the assets that come into its hands as sovereign in a way that *it* decides is best for the future of the Nation". Concurring opinion *Alabama v. Texas*, 347 U.S. at 277. (Emphasis added.) See also ftnte. 6 Cherokee Brief p. 17.

political autonomy was to be insured by granting fee simple title without reservation or exception to all the land within the metes and bounds description.

The Arkansas River, navigable as it is, is completely circumscribed by the description. One portion of the Arkansas River, above the Canadian is surrounded on both sides by the land of the Cherokees. Yet respondents argue ineffectually on pp. 73-74 that there was clear exclusion of the Arkansas River. This is a perversion of the treaty. By treaty the westerly line was to be run up and between the Canadian and the Arkansas so as to make up the requisite seven million acres [amended in 1833 the grant moved the westerly line North of the Creek country.] Clearly any line so drawn would completely envelop the Arkansas River, as any map will demonstrate. A construction as is contended for by the respondents would produce the unreasonable result of splitting into two pieces a tract of land which existed as an undivided whole, subject only to the power of Congress to regulate commerce and navigation, an easement as it were, and which in reason must be considered to have been conveyed as a single tract and not to have been split into separate parts with a thin wedge of land between. *Lewis v. East Texas Finance Co.*, 136 Tex. 149, 146 S.W. 2d 977, 981 (1941).

The onus is on the grantor in such a situation to reserve or exclude those portions. Otherwise, the land passes in toto to the grantee. See *Shell Oil Petroleum Corp. v. Ward*, 100 F.2d 778 (5th Cir. 1939). As the Government argues, the portion of the Arkansas River which forms the boundary between the two petitioners was completely surrounded by land to which the Government had granted fee simple title without reservation. When a river is a boundary line, the rule is stated in *Iowa v. Illinois*, 147 U.S. at 7: "When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdic-

tion of the two separates is well established to be the middle of the main channel of the stream." Certainly whatever the conflicting claims of the petitioners might be as to bed of the river and the placement of the boundary line, the title to the river bed was not retained by the Government for some yet to be formed state, later called Oklahoma.[10]

The respondents set forth as Appendix 6 and 7 material on pages xii and xiii an early map, apparently by C. C. Royce, which has a solid black line drawn on the north bank of the Arkansas River, as the supposed boundary line of the Cherokee Nation. This map misrepresents the true C. C. Royce map which petitioner has submitted herewith as Petitioner's Exhibit A.[11] C. C. Royce Map, Fifth Annual Report Pl. IX (1884).

Throughout the brief the respondents infer that the petitioner somehow waived its title or that the State of Oklahoma has acquired title by adverse possession *e.g.*, [Oklahoma] "has asserted its ownership actively since statehood on November 16, 1907" (Respondents' Brief at page 4) or "The state has asserted ownership of the mineral resources in the river bed for over sixty years . . ." To set the record straight and to resolve all doubt, the doctrine of adverse possession, laches, has no efficacy

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[10] In appendix F of the Cherokee Brief, the 1886 letter of I.D.C. Atkins, Commissioner of Indian Affairs, was cited to show that at no time did it appear that title to the land beneath the navigable river was held for a future state. Whether the boundary between the Cherokee Nation and the Choctaw-Chickasaw Nations is the south bank, the center line, or the north bank is in dispute.

[11] In any event, it need only be said in passing, whatever the map shows, C. C. Royce is merely a secondary source. The controlling documents are, of course, the treaties and patent which set forth the perimeters of the land conveyed.

against sovereigns such as the petitioner. Accord, *Cherokee Nation v. Georgia,* 30 U.S. [5 Pet.] 1. The petitioner has always had title and the failure to take action sooner should not militate against the rights and title of the Cherokee Nation which were conveyed by the treaties and patent.

CONCLUSION

The respondents have not answered the petitioner's claim of title. Accordingly this Court should reverse the decision of the Court of Appeals.

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Petitioner's Exhibit A

1884 Map by C.C. Royce

Fifth Annual Report, Bureau
of American Ethnology, Smithsonian
Institute Plate IX.